Supreme Court, U.S.
FILED
DEC 10 1980
MICHAEL RODAK JR., CLERK

No. 80-783

IN THE SUPREME COURT
OF THE
UNITED STATES
October Term, 1980

PARK COUNTY, MONTANA and SWEET GRASS COUNTY, MONTANA, political subdivisions of the STATE OF MONTANA,

Petitioners,

-vs-

UNITED STATES OF AMERICA, acting by and through the SECRETARY OF AGRICULTURE and the FOREST SUPERVISOR of the Gallatin National Forest, and CROSS CREEK PROTECTIVE ASSOCIATION,

Respondents.

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF CROSS CREEK PROTECTIVE ASSOCIATION IN OPPOSITION TO PETITION FOR CERTIORARI

Counsel for Respondent, CROSS CREEK PROTECTIVE ASSOCIATION:

JAMES H. GOETZ
Goetz & Madden
P. O. Box 1322
Bozeman, Montana 59715
Phone: (406) 587-0618

No. 80-783

IN THE SUPREME COURT

OF THE

UNITED STATES

October Term, 1980

PARK COUNTY, MONTANA and SWEET GRASS COUNTY, MONTANA, political subdivisions of the STATE OF MONTANA,

Petitioners,

-vs-

UNITED STATES OF AMERICA, acting by and through the SECRETARY OF AGRICULTURE and the FOREST SUPERVISOR of the Gallatin National Forest, and CROSS CREEK PROTECTIVE ASSOCIATION,

Respondents.

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF CROSS CREEK PROTECTIVE ASSOCIATION IN OPPOSITION TO PETITION FOR CERTIORARI

INDEX OF CONTENTS

	Page
CASE CITATIONS	ii
STATUTES OF UNITED STATES	iii
RULES OF SUPREME COURT	iii
STATUTES INVOLVED	2
QUESTIONS PRESENTED	2
STATEMENT	2
ARGUMENT AND LEGAL AUTHORITY	6
CONCLUSION	11
CERTIFICATE OF SERVICE	11

CASE CITATIONS	Page
Gendron v. United States 402 F. Supp. 46 (E.D. Cal., 1974), aff'd 524 F. 2d 1154 (9th Cir., 1975)	10
Grosz v. Andrus 556 F. 2d 972 (9th Cir., 1977)	10
H-10 Water Taxi Co. Ltd. v. United States 379 F. 2d 963 (9th Cir., 1967)	10
Mann v. United States 399 F. 2d 672 (1968)	9
Munro v. United States 303 U.S. 38	8
Power v. United States 390 F. 2d 602 (9th Cir., 1968)	10
Sentilles v. Inter-Caribbean Shipping Corp. (1959) 361 U.S. 107, 111 S. Ct. 173, 4 L.Ed. 142	6
Simmons v. Vinson 394 F. 2d 732 (5th Cir., 1968)	8
Soriano v. United States 352 U.S. 270	10
United States v. Sherwood 312 U.S. 584 (1941)	7

STATUTES OF UNITED STATES	Page
28 U.S.C. 2409	2
28 U.S.C. 2409a	2, 8
28 U.S.C. 2409a(f)	2, 3, 4, 6, 8, 10
43 U.S.C. 932	3
RULES OF SUPREME COURT	
Rule 17	7
Rule 28	11

STATUTES INVOLVED

The statute involved is 28 U.S.C. §2409a, Federal quiet title statute, which is reproduced at pp. 3-5 of the Petition for Certiorari.

QUESTIONS PRESENTED

1. Whether the 12-year statute of limitations under 28 U.S.C. §2409a(f) applies to every action brought under that act, notwithstanding that the plaintiff is a state, a political subdivision of a state, or some other governmental entity; and,

2. Whether the district court properly concluded that as a matter of law there was adequate notice that the plaintiff counties knew or should have known of the claim of the United States to the purported right-of-way more than 12 years before this action was brought.

STATEMENT

Petitioners are counties, which are political subdivisions of the State of Montana. On October 4, 1976, Petitioners filed a complaint, pursuant to 28 U.S.C. §2409, to quiet title to a claimed

PREVIOUS PAGE WAS BLANK

easement across certain lands located within the boundaries of the Gallatin National Forest. Subsequently, Cross Creek Protective Association (hereinafter referred to as "Cross Creek"), a local citizen organization, was allowed to intervene as a defendant.

The Petitioners claim that they established the alleged road in 1893 across the unreserved public domain pursuant to 43 U.S.C. §932.[1]

The United States and Cross Creek both raised the 12-year statute of limitations, 28 U.S.C. §2409a(f), as a bar to the counties' actions. The Petitioners contend that, notwithstanding its literal wording,[2] the statute of limitations is

---

[1] 43 U.S.C. §932 reads as follows:

"The right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted. R.S.§2477."

The Gallatin National Forest was not created until 1902 (then called the "Absaroka" National Forest). Therefore, the right-of-way in question was not "reserved for public uses" in 1893 when the road allegedly was established.

[2] 28 U.S.C. §2409a(f) provides:

"Any civil action under this section shall be barred unless it is commenced within 12 years of the date upon which it accrued...."

inapplicable to them because they are "political subdivisions" of the state government.

The District Court rejected the Petitioners' argument holding that it had no power to engraft exceptions for any reasons to the language of 28 U.S.C. §2409a(f) and that the 12-year statute of limitations must be strictly construed. The Court of Appeals affirmed.

Dismissal and Summary Judgment were granted on the statute of limitations question. The District Court and the Court of Appeals held that the purported right-of-way travels a route following two Forest Service trails. The District Court concluded that "[U]nquestionably the trails are United States Forest Service trails. The Forest Service has maintained the trails since the early part of the Twentieth Century. Neither of the counties has maintained the purported road or authorized expenditures of any county money to maintain the routes in the Absaroka National Forest." (See p. 20, Appendix to Petition for Certiorari).

The lower courts also found that a

portion of the claimed right-of-way follows a trail which passes through Absaroka Primitive Area, which was established in April of 1932. In 1962, over 12 years before commencement of this action, the Forest Service placed a sign on the trail at the north end of the Absaroka Primitive Area at a point at which the purported road follows the trail. The sign stated "Entering Absaroka Primitive Area--Motor Vehicles Prohibited--Gallatin National Forest."

The Circuit Court observed: "The sign gave notice that motor vehicle traffic was being prohibited by the Forest Service. A rock barrier was also placed across the trail in front of the sign. The district court, therefore, properly concluded that in 1962 the Forest Service claimed ownership and jurisdiction of the land traversed by the purported right-of-way by posting notice of its interest... The county should have known of the United States' claim to the lands in question on or before October 4, 1964." (P. 16, Appendix to Petition for Writ of Certiorari).

ARGUMENT AND LEGAL AUTHORITY

The two questions presented are unimportant. The Petition for Certiorari puts forward no persuasive reason why the limited and valuable time of the United States Supreme Court should be spent on this case.

The second question listed above under "Questions Presented" is simply whether summary judgment is proper. It appears that the Petitioners want an opportunity to re-argue the particular facts of the case to persuade this Court that there are material factual issues in dispute which warrant a remand. See concurring opinion of Justice Stewart in Sentilles v. Inter-Caribbean Shipping Corp., (1959) 361 U.S. 107, 111 S. Ct. 173, 4 L. Ed. 2d 142: "To review individualized personal injury cases, in which the sole issue is sufficiency of the evidence, seems to me not only to disregard the Court's proper functions, but also to deflect the Court's energies from the mass of important and difficult business properly here...."

The other question at issue, whether the statute of limitations, 28 U.S.C.

§2409a(f) applies to subdivision of state governments, is likewise unimportant. There is no conflict among the Federal Circuits or among the states on this question. There is no showing that the decisions below are in conflict with decisions of this Court. No showing is made that this case fits any of the categories listed under Rule 17, Rules of the Supreme Court of the United States.

Apart from the unimportance of the issues (beyond the interests of the immediate parties), it is the case that the questions presented were correctly decided by the courts below.

The reasons underlying the requirement of strict compliance with Federal statutes of limitations are concisely articulated in numerous Federal cases. In United States v. Sherwood, 312 U.S. 584 (1941), this Court said:

> "The United States, as sovereign, is immune from suit save as it consents to be sued (citing cases) ...and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit. (Emphasis added).

Thus, the United States is immune from suit unless it consents to be sued. This is a jurisdictional question. Unless

Congress confers jurisdiction, there is none. And jurisdiction is conferred on such terms, restrictions, and limitations, as Congress sees fit. This is confirmed in Munro v. United States, 303 U.S. 38, where the Court held:

> "Suits against the United States can be maintained only by permission, in the manner prescribed and subject to the restrictions imposed. Reid v. United States, 211 U.S. 529, 538." 303 U.S. at 41.

Prior to the enactment of the quiet title statute here in question (28 U.S.C. §2409a), there was no right to sue the Federal Government to quiet title. See Simmons v. Vinson, 394 F. 2d 732 (5th Cir., 1968). The enactment of 28 U.S.C. §2409a constituted a limited waiver of sovereign immunity by the Congress--but such waiver was upon the conditions that the Congress established. Among such conditions was the statute of limitations, 28 U.S.C. §2409a(f), which is as follows:

> "Any civil action under this section shall be barred unless it is commenced within twelve years of the date upon which it accrued...." (Emphasis added).

Petitioner asks this Court, on policy grounds, to carve an exception to the rule of strict compliance with the statute of limitations for entities of local government. This cannot be done if the integrity of the principle of Federal sovereign immunity is to be preserved.

The Ninth Circuit has squarely rejected a similar plea for relaxed compliance with a federal statute of limitations in Mann v. United States, 399 F. 2d 672 (1968). In Mann, an Indian brought untimely suit under the Federal Tort Claims Act. He argued on appeal (after dismissal) that the limitation period should be enlarged for him, for policy reasons. The Ninth Circuit rejected his plea, finding itself without power to change the strictures established by Congress:

> "...[W]e are...convinced that Congress has left no room for an exception to be made in the present case. Although exceptions to the applicability of the limitations period might occasionally be desirable, we are not free to enlarge that consent to be sued which the Government, through Congress, has undertaken so carefully to limit. See United States v. Sherwood, 312 U.S. 584...(1971). The limitations period established

> by Congress 'must be strictly observed and exceptions thereto are not to be implied.'" 352 U.S. 220, 226 (1957). (Emphasis added).

In the present case, there is no exception for states or counties contained in the statute of limitations, 28 U.S.C. §2409a(f). Indeed, the language is clear and to the contrary. As stated by this Court in Soriano v. United States, 352 U.S. 270, there must be strict observance of the limitations period established by Congress, and exceptions "are not to be implied."

There being no exceptions to the requirements of 28 U.S.C. §2409a(f), Petitioners are forced to ask this Court to find one by implication. These policy arguments would be better directed to Congress. As the Supreme Court indicated in Soriano, the judiciary is not free to develop exceptions. See also Gendron v. United States, 402 F. Supp. 46 (E.D.Cal., 1974), aff'd. 524 F. 2d 1154 (9th Cir., 1975); Grosz v. Andrus, 556 F. 2d 972 (9th Cir., 1977); Power v. United States, 390 F. 2d 602 (9th Cir., 1968); H-10 Water Taxi Co. Ltd. v. United States, 379 F. 2d

963 (9th Cir., 1967).

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

JAMES H. GOETZ



Counsel of Record for
Respondent Cross Creek
Protective Association
Address: P. O. Box 1322
Bozeman, Montana
59715

CERTIFICATE OF SERVICE

The undersigned, a member of the Bar of the Supreme Court of the United States, and counsel of record for Respondent, Cross Creek Protective Association, does hereby certify, pursuant to Rule 28 of the Rules of the United States Supreme Court, that on the 5th day of December, 1980, copies of the foregoing Brief were served upon all parties required to be served as follows:

Solicitor General
Department of Justice
Washington, D. C. 20530

Conrad B. Fredricks
Sweet Grass County Attorney
115 West 2nd Avenue
P. O. Box 1047
Big Timber, Montana 59011

Bruce Becker
Park County Attorney
Park County Courthouse
Livingston, Montana 59047

Kenneth Olson
Special Deputy Sweet Grass
County Attorney
Suite 316, 600 Central Plaza
Great Falls, Montana 59401

Dated this 7th day of December, 1980.

JAMES H. GOETZ